

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HONORIA CASTANON,

Plaintiff,

v.

JO ANNE B. BARNHART,

Defendant.

No. C 05-03098 CW

ORDER DENYING  
CROSS-MOTIONS FOR  
SUMMARY JUDGMENT  
AND GRANTING  
PLAINTIFF'S  
MOTION TO REMAND

Plaintiff Honoria Castanon moves for summary judgment or for remand on her claim that the Social Security Administration (SSA) and Appeals council wrongly denied her Title II Disability Benefits for the period April 16, 2001 to March 31, 2004. Defendant Jo Anne B. Barnhart, in her capacity as Commissioner of the SSA, opposes this motion and cross-moves for summary judgment. Having considered all of the papers filed by the parties, the Court DENIES the cross-motions for summary judgment and GRANTS Plaintiff's motion to remand.

BACKGROUND

I. Procedural History

On September 13, 2001, Ms. Castanon filed her first application for disability insurance benefits (DIB) under Title II of the Social Security Act alleging that she became unable to work on April 16, 2001 due to carpal tunnel syndrome (CTS) and residual

1 pain in her fingers and neck from past surgeries. On February 4,  
2 2002, the SSA denied the application. Ms. Castanon did not appeal  
3 the determination.

4 On January 28, 2003, Ms. Castanon filed a second application  
5 for DIB alleging disability due to the same impairments and the  
6 same onset date of April 16, 2001. After being denied initially  
7 and upon reconsideration by the SSA, Ms. Castanon requested a  
8 hearing before an administrative law judge (ALJ) which was held on  
9 May 24, 2004. On September 23, 2004, the ALJ granted Ms. Castanon  
10 DIB as of April 1, 2004, the month in which she turned fifty-five,  
11 but found that Ms. Castanon was not disabled prior to that date.  
12 On June 20, 2005, the Appeals Council declined Ms. Castanon's  
13 request for review of the denial of benefits from April 16, 2001  
14 through March 31, 2004. Ms. Castanon commenced this action for  
15 judicial review pursuant to 42 U.S.C. § 405(g).

16 II. Factual History

17 A. Plaintiff's Education and Work Experience

18 Ms. Castanon was born in Mexico on April 1, 1949 and testified  
19 that she had completed the equivalent of a third grade education  
20 there. (Administrative Record (AR) 316). However, on her  
21 application for DIB, she reported that her highest education level  
22 was the fourth and sixth grades. (AR 104, 121, 165, 280). Ms.  
23 Castanon arrived in the United States in 1968 and attended one year  
24 of school where she learned "a little bit of English." (*Id.* at  
25 316-17). From November 28, 1971 until April 16, 2001, she was  
26 employed as a bottling line attendant by the Beringer Wine Company  
27 where she operated light machinery and performed custodial

1 services. (AR 318-19). From April 16, 1998 through April 15,  
2 2001, she was also employed by the Napa County In Home Support  
3 Services to provide in-home care for her disabled mother. (AR 92).

4 B. Plaintiff's Medical History

5 On April 16, 2001, while she was at work, Ms. Castanon noticed  
6 pain and swelling in both forearms. (AR 225, 277). On April 18,  
7 2001, Ms. Castanon was examined by Dr. Patricia K. Stagg who  
8 ordered x-rays of Ms. Castanon's wrists and cervical spine. The x-  
9 rays revealed no radiographic abnormalities of the wrists, but some  
10 interbody fusion and swelling of prevertebral soft tissue. (AR  
11 220). Ms. Castanon was referred to Dr. Alan Kimelmann who  
12 performed a nerve conduction study which showed "[b]orderline right  
13 median nerve mononeuropathy at the wrist consistent with borderline  
14 carpal tunnel syndrome." (AR 181-2). On July 11, 2001 and August  
15 22, 2001, Ms. Castanon underwent excision of a right dorsal wrist  
16 ganglion cyst and a right carpal tunnel release procedure. (AR  
17 218-9.)

18 On November 26, 2001, in a report to Safeco Insurance Company,  
19 Beringer's insurance carrier, Dr. Stagg diagnosed Ms. Castanon with  
20 bilateral arm tendinitis, right ganglionic cyst, and right CTS, and  
21 indicated that Ms. Castanon was precluded from repetitive forceful  
22 grasping bilaterally, was unable to perform her past work as a  
23 machine operator, and her disability status should be considered  
24 "Permanent and Stationary." (AR 225-7). From early 2000 until  
25 March, 2003, Ms. Castanon was also treated by Dr. Gary P. McCarthy.  
26 (AR 256). In a June 14, 2002 report to Safeco Insurance Company,  
27 Dr. McCarthy wrote that Ms. Castanon is a "qualified injured worker  
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1 and can no longer work on the bottling line" (AR 258) due to  
2 suffering from numbness, upper extremity pain, and neck pain. (AR  
3 256).

4 On December 16, 2001, at request of the SSA, Ms. Castanon was  
5 examined by Dr. Jay Chun, a neurologist, who diagnosed her with,  
6 among other things, neck pain and bilateral hand pain secondary to  
7 CTS. (AR 241). Dr. Chun opined that Ms. Castanon could  
8 occasionally lift and carry ten pounds depending on her hand pain,  
9 was unrestricted with regard to sitting, standing and walking, but  
10 that she suffered from moderate to severe limitations in handling,  
11 feeling, grasping, and fingering due to CTS. (Id.)

12 In January, 2002, SSA Medical Consultant Dr. C. Richard Dann  
13 reviewed Ms. Castanon's medical records and concluded that she had  
14 a residual functional capacity (RFC)<sup>1</sup> to lift and carry twenty-five  
15 pounds frequently, to lift and carry fifty pounds occasionally with  
16 upper extremity limitations, and could sit and stand approximately  
17 six hours in an eight hour workday. (AR 244).

18 On June 26, 2003, at the request of the SSA, Dr. James M.  
19 Talcott, an orthopedic surgeon, examined and evaluated Ms.  
20 Castanon. (AR 259). Dr. Talcott diagnosed Ms. Castanon with  
21 bilateral CTS, musculoskeletal low back pain, and post-op cervical  
22 fusion. (AR 261). He also indicated, among other things, that Ms.  
23 Castanon was "unable to work and is essentially debilitated" and  
24 reported that she was precluded from repetitive use of her upper  
25 extremities, was unable to do forceful gripping and grasping, could

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26  
27 <sup>1</sup> Residual functional capacity is the most an individual can  
do despite his or her limitations. 20 C.F.R. § 404.1545.

1 sit, stand, and walk for up to four hours of an eight-hour workday,  
2 and could lift in excess of twenty pounds. (AR 261).

3 On July 11, 2003, Dr. Buenor D. Puplampu, a qualified medical  
4 examiner, examined Ms. Castanon and diagnosed her with, among other  
5 things, right CTS, right dorsal ganglion cyst, and bilateral upper  
6 extremity tendinitis. (AR 283). Dr. Puplampu opined that because  
7 Ms. Castanon has some "permanent partial disability with respect to  
8 her repetitive strain injuries" that precludes "Repetitive Use of  
9 Both Upper Extremities," she could not return to work, and was a  
10 candidate for vocational rehabilitation. (Id. at 284).

11 On July 30, 2003, Ms. Castanon's medical records were reviewed  
12 for the SSA by Dr. M. Mehrkhast who determined that Ms. Castanon  
13 had the following RFC: she could occasionally lift twenty pounds,  
14 frequently lift ten pounds, and sit, stand, and walk for six hours,  
15 but with no frequent gripping, grasping, typing, or fine  
16 manipulation. (AR 264-6).

17 September 22, 2003 treatment notes from Dr. George Friedman,  
18 who treated Ms. Castanon from September, 2002 through January,  
19 2004, indicate that Ms. Castanon complained of feeling depressed.  
20 (AR 289-292). Dr. Friedman prescribed Paxil for the depression and  
21 recommended physical therapy. (AR 288-91, 300). According to Dr.  
22 Friedman's notes dated November 4, 2003, Ms. Castanon's depression  
23 improved after taking Paxil. (AR 289).

24 C. 2003 Hearing

25 On May 24, 2004, a hearing was held before the ALJ at which  
26 Ms. Castanon, who was represented by counsel, testified. (AR 19).  
27 A Spanish language interpreter translated for Ms. Castanon. (AR  
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19). A vocational expert (VE) also testified. Id. The ALJ posed three hypothetical questions to the VE. The first hypothetical assumed "someone of the claimant's age, education, and experience, [with] the capacity for exertionally light work . . . with no repetitive forceful grasping bilaterally." (AR at 333). The VE responded that someone with this RFC could engage in Ms. Castanon's past work as a bottling line attendant because he did not consider a bottle of wine to be something that required forceful grasping. (AR at 334). The second hypothetical involved the same person but with the additional limitations of only occasional reaching, handling and fingering bilaterally. Id. The VE responded that the past work as a bottling line attendant would be eliminated, but listed jobs this hypothetical person could do such as Counter Clerk (DOT code 249-366.010), Gate Guard (372-667.030), Usher (DOT code 344-677.014), and Children's Attendant (DOT code 349-677.018). (AR 334-7).

In the third hypothetical, the ALJ asked whether these jobs would be impacted by an individual's limited English ability. AR at 338. The ALJ clarified that this person would be able to communicate in English, but was not fluent in English. Id. The VE responded that, when accounting for the language limitations, the number of available jobs for photo counter clerk and gate guard would be impacted, the usher job would be severely impacted, and the child attendant job would be completely eliminated. (AR 338-340).

D. 2003 ALJ Findings

On September 23, 2004, the ALJ issued his decision in which

he concluded that, based on Medical-Vocation Rule 202.02, Ms. Castanon was disabled beginning on April 1, 2004 when she turned fifty-five. However, based on Medical-Vocation Rule 202.10, he determined that Ms. Castanon was not disabled from April 16, 2001 through March 31, 2004 when she was fifty through fifty-four years old. (AR 26).

At step one of the sequential evaluation,<sup>2</sup> the ALJ found that Ms. Castanon had not engaged in any substantial gainful activity since her alleged disability onset date of April 16, 2001. (AR 20). At step two, the ALJ found that Ms. Castanon suffered from medically "severe" impairments including CTS of the right wrist,

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<sup>2</sup> To determine whether a claimant is disabled within the meaning of the Social Security Act, the Social Security Regulations set out a five-step sequential process. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998); Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir. 1991); 20 C.F.R. § 404.1520 (b)-(f). The burden of proof is on the claimant in steps one through four. Sanchez v. Sec'y of Health & Human Servs., 812 F.2d 509, 511 (9th Cir. 1987). In step one, the claimant must show that she or he is not currently engaged in substantial gainful activity. 20 C.F.R. § 404.1520(b). In step two, the claimant must show that he or she has a "medically severe impairment or combination of impairments" that significantly limits his or her ability to work. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); 20 C.F.R. § 404.1520(c). If the claimant does not, he or she is not disabled. Otherwise, the process continues to step three for a determination of whether the impairment meets or equals a "listed" impairment which the regulations acknowledge to be so severe as to preclude substantial gainful activity. Yuckert, 482 U.S. at 141; 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404, Subpt. P, App. 1. If this requirement is met, the claimant is conclusively presumed disabled; if not, the evaluation proceeds to step four. At step four, it must be determined whether the claimant can still perform "past relevant work." Yuckert, 482 U.S. at 141; 20 C.F.R. § 404.1520(e). If the claimant can perform such work, he or she is not disabled. If the claimant meets the burden of establishing an inability to perform prior work, the burden of proof shifts to the Commissioner for step five. At step five, the Commissioner must show that the claimant can perform other substantial gainful work that exists in the national economy. Yuckert, 482 U.S. at 141; 20 C.F.R. § 1520(f).

1 bilateral tendinitis, obesity, and post cervical fusion. (AR 22).  
2 The ALJ found that Ms. Castanon's depression did not qualify as a  
3 severe impairment because she did not receive treatment  
4 specifically for depression, nor was it separately diagnosed as a  
5 medical illness by any of her treating or examining physicians. (AR  
6 22).

7 At step four of the sequential analysis, the ALJ indicated  
8 that he accorded more weight to the opinions of Ms. Castanon's  
9 treating physicians than to the opinions of the examining and non-  
10 examining physicians, but he did not accord them controlling weight  
11 "because the sitting/standing/walking limitations given in Exhibit  
12 8F [orthopedic consultant Dr. Talcott's opinion that Ms. Castanon  
13 can sit, stand and walk four hours out of an eight hour day] were  
14 too restrictive in light of the objective evidence; and the 10  
15 pound maximum (Exhibit 4F) [neurologic consultant Dr. Chun's  
16 opinion that Ms. Castanon can carry occasionally ten pounds] was  
17 likewise too restrictive, whereas the estimate that claimant is  
18 capable of medium work activity is too liberal. My RFC is a  
19 compromise, over time, based on the actual objective evidence and  
20 testimony." (AR 23). The ALJ concluded that Ms. Castanon has the  
21 RFC to perform a light level of work activity<sup>3</sup> with manipulative

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23 <sup>3</sup> Light work involves lifting no more than twenty pounds at a  
24 time with frequent lifting or carrying of objects weighing up to  
25 ten pounds. Even though the weight lifted may be very little, a  
26 job is in this category when it requires a good deal of walking or  
27 standing, or when it involves sitting most of the time with some  
28 pushing and pulling of arm or leg controls. To be considered  
capable of performing a full or wide range of light work, the  
claimant must have the ability to do substantially all of these  
activities. 20 C.F.R. § 404.1567(b). Light work requires standing  
or walking, off and on, for a total of approximately six hours of



1 limitations allowing only occasional reaching, handling, and  
2 fingering bilaterally. (AR 23, 25). Based on the testimony of the  
3 VE, the ALJ found that Ms. Castanon lacked the RFC to perform the  
4 requirements of her prior relevant work (PRW) as a bottling line  
5 attendant. (AR 24).

6 At step five, the ALJ concluded that Ms. Castanon's claim that  
7 she is illiterate in English is unfounded. (AR 23). For this  
8 conclusion, the ALJ relied on the following evidence: (1) Ms.  
9 Castanon resided in the United States for more than thirty years;  
10 (2) she has been described or has described herself as having basic  
11 English skills [May 16, 2003 Vocational Testing Report], having  
12 limited English skills [Vocational Rehabilitation Progress Report  
13 covering period April 4, 2003 through May 23, 2003], having the  
14 ability to read and write English [Disability Report Application]  
15 and speaking English pretty well [August 21, 2001 and December 5,  
16 2002 Observations of SSA Phone Interviewer]; (3) a March 11, 2004  
17 vocational testing report mentioned no language limitations, though  
18 it did refer to various documents that are available in Spanish,  
19 and reported that Ms. Castanon initiated and engaged in  
20 interpersonal relations with others at the evaluation center with  
21 no mention of language restrictions; and (4) Ms. Castanon answered  
22 compound questions at the hearing prior to translation and even  
23 corrected the English translation provided by the interpreter at  
24 one point. The ALJ concluded that because Ms. Castanon's capacity  
25 for the full range of light work was reduced by the additional

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27 an eight-hour workday. SSR 83-10 at 5-6.

1 limitations of advanced age, marginal education, and unskilled work  
2 background which narrowed the range of work she can perform, she  
3 was disabled for "the period beginning April 1, 2004, the month  
4 claimant attained age 55," based on Medical-Vocational Rule 202.02,  
5 but she was not disabled prior to that date. (AR 24-5).

6 LEGAL STANDARD

7 I. Overturning a Denial of Benefits

8 A court cannot set aside a denial of benefits unless the ALJ's  
9 findings are based upon legal error or are not supported by  
10 substantial evidence in the record as a whole. 42 U.S.C. § 405(g);  
11 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989); Martinez v.  
12 Heckler, 807 F.2d 771, 772 (9th Cir. 1986). Substantial evidence  
13 is such relevant evidence as a reasonable mind might accept as  
14 adequate to support a conclusion. Richardson v. Perales, 402 U.S.  
15 389, 401 (1971); Orteza v. Shalala, 50 F.3d 748, 749 (9th Cir.  
16 1995). It is more than a scintilla but less than a preponderance.  
17 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).

18 To determine whether substantial evidence exists to support  
19 the ALJ's decision, a court reviews the record as a whole, not just  
20 the evidence supporting the decision of the ALJ. Walker v.  
21 Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not  
22 affirm the ALJ's decision simply by isolating a specific quantum of  
23 supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.  
24 1989). In short, a court must weigh the evidence that supports the  
25 Commissioner's conclusions and that which does not. Martinez, 807  
26 F.2d at 772.

27 If there is substantial evidence to support the decision of  
28

1 the ALJ, it is well-settled that the decision must be upheld even  
2 when there is evidence on the other side, Hall v. Sec'y of Health,  
3 Educ. & Welfare, 602 F.2d 1372, 1374 (9th Cir. 1979), or when the  
4 evidence is susceptible to more than one rational interpretation,  
5 Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984). If  
6 supported by substantial evidence, the findings of the ALJ as to  
7 any fact will be conclusive. 42 U.S.C. § 405(g); Vidal v. Harris,  
8 637 F.2d 710, 712 (9th Cir. 1981).

9 II. Establishing Disability Under the Social Security Act

10 Under the Social Security Act, "disability" means:

11 inability to engage in any substantial gainful activity by  
12 reason of any medically determinable physical or mental  
13 impairment which can be expected to result in death or which  
has lasted or can be expected to last for a continuous period  
of not less than twelve months.

14 42 U.S.C. § 423 (d)(1)(A). The impairment must be so severe that  
15 the claimant "is not only unable to do his previous work but cannot  
16 . . . engage in any other kind of substantial gainful work."

17 42 U.S.C. § 423(d)(2)(A). In addition, the impairment must result  
18 "from anatomical, physiological, or psychological abnormalities  
19 which are demonstrable by medically acceptable clinical and  
20 laboratory techniques." 42 U.S.C. § 423(d)(3).

21 DISCUSSION

22 I. ALJ's Assessment of Ms. Castanon's Education and Literacy

23 Ms. Castanon appeals the ALJ's finding, based on Medical-  
24 Vocational Guideline Rule 202.10, that she is a person with a  
25 marginal education, as opposed to one who is illiterate in English.  
26 The Commissioner argues that the evidence in the record is  
27 sufficient to sustain the ALJ's finding that Ms. Castanon has a

1 marginal education and is not illiterate, and thus was not disabled  
2 between the ages of fifty and fifty-four.

3 A. Legal Standard

4 The Medical-Vocational Guidelines are administrative tools that  
5 the Commissioner may use at step five of the disability evaluation.  
6 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988). Based on  
7 age, education, work experience, and "exertional capacity," the  
8 guidelines determine the employability of claimants with  
9 "substantially uniform levels of impairment." Id.; see also 20  
10 C.F.R. pt. 404, subpt. P, app. 2.

11 Medical-Vocational Guidelines (Grids) Rule 202.00(c) provides  
12 that a claimant who is limited to light work, is past the age of  
13 fifty-five years old, and has a history of unskilled work  
14 experience, is disabled. 20 C.F.R. pt. 404, subpt. P, app. 2. Rule  
15 202.00(d) provides that a claimant who possesses the same  
16 characteristics as described in Rule 202.00(c), but who is between  
17 the ages of fifty and fifty-four years old, and who is illiterate or  
18 unable to communicate in English, is disabled. Id. The word "or"  
19 in Rule 202.00(d) is to be construed as encompassing a person who is  
20 illiterate in English or who is unable to communicate in English, or  
21 both. Chavez v. Department of Health and Human Services, 103 F.3d  
22 849, 852 (9th Cir. 1996); Silveira v. Apfel, 204 F.3d 1257, 1262  
23 n.13 (9th Cir. 2000). Illiteracy is defined as "the inability to  
24 read or write" in English. 20 C.F.R. § 404.1564(b)(1) and (5).  
25 Generally, an illiterate person "cannot read or write a simple  
26 message such as instructions or inventory lists, even though the  
27 person can sign his or her name." Id. "The ability to communicate  
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1 in English" is defined as "the ability to speak, read, and  
2 understand English." 20 C.F.R. § 404.1564(b)(5).

3 Rule 202.10 provides that a claimant who is limited to light  
4 work, is between the ages of fifty and fifty-four years old, has a  
5 history of unskilled work experience, and whose education is  
6 "[l]imited or less - [a]t least literate and able to communicate in  
7 English," is not disabled. Id.

8 B. Analysis

9 In order for the ALJ to have concluded that Grid Rule 202.00(d)  
10 did not apply to Ms. Castanon, he would have had to find that she  
11 was able to communicate in English and that she was literate in  
12 English. To conclude that Ms. Castanon was literate in English, he  
13 would have had to find that she could read and write simple  
14 messages, such as instructions or inventory lists. The evidence  
15 relied on by the ALJ arguably may have demonstrated that she was  
16 able to speak and understand English, but it did not demonstrate  
17 that she could read or write simple instructions in English. The  
18 first vocational report cited by the ALJ, AR 141, stated that Ms.  
19 Castanon could understand basic words and basic written materials in  
20 English. However, it did not state that Ms. Castanon could write  
21 basic instructions in English. Furthermore, this same report  
22 indicated that the supervisor assigned to Ms Castanon was Spanish-  
23 speaking, that the instructions given to her were in Spanish and  
24 that the job application she was given to fill out was in Spanish.  
25 AR 140-41. The second vocational report cited by the ALJ, AR 162,  
26 indicated that Ms. Castanon is a very limited English speaker.  
27 These reports do not support the conclusion that Ms. Castanon can  
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1 read and write instructions and inventory lists in English.

2       The third document relied upon by the ALJ, AR 97, is the SSA  
3 Disability Report form, on which Ms. Castanon, or someone filling  
4 the form out for her, checked a box indicating that she can read  
5 English and that she can write more than her name in English.  
6 However, on the same form, Ms. Castanon did not check the box that  
7 she could speak English, but checked the box indicating that she  
8 spoke Spanish. The fact that these boxes were checked does not  
9 establish that Ms. Castanon can read or write simple instructions or  
10 inventory lists in English. The ALJ also relied on two reports of  
11 an SSA interviewer who spoke to Ms. Castanon over the telephone, AR  
12 95 and 113, who thought Ms. Castanon spoke English "pretty well."  
13 Although this evidence may establish that Ms. Castanon can speak and  
14 understand English, it does not address her ability to read or write  
15 in English. The last two items relied upon by the ALJ, the fact  
16 that she was able to interact with other people at the vocational  
17 rehabilitation center, and the fact that, at the hearing, she may  
18 have understood a question in English before she heard the  
19 translation, also does not address her ability to read and write in  
20 English.

21       Evidence in the record contradicts the ALJ's conclusion that  
22 Ms. Castanon is literate in English. Two vocational evaluation  
23 reports specify that Ms. Castanon "has some English comprehension,  
24 but is not fluent in English," "has limited reading/writing skills  
25 in English" (AR 164), and is a very limited English speaker (AR  
26 162). A May 16, 2003 vocational testing report indicates that Ms.  
27 Castanon was given an application form in Spanish that was

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1 structured like a job application. (AR 140). The same report  
2 indicated that although Ms. Castanon was able to understand basic  
3 words in English, basic oral directions in English and basic written  
4 materials in English, she was assigned a Spanish-speaking  
5 supervisor, and the summary concluded that Ms. Castanon was not a  
6 tenable candidate for vocational rehabilitation due, in part, to her  
7 below average verbal skills in English. (AR at 141, 143). Another  
8 vocational status report indicated that Ms. Castanon did not have  
9 the English skill level to pass a school bus driving test. (AR at  
10 161). Two physicians reported that they used Spanish language  
11 interpreters when examining Ms. Castanon. (AR 251 ("Part of the  
12 history was obtained using my rudimentary Spanish, and the remainder  
13 of the history was done when the interpreter arrived late") and AR  
14 277 ("Ms. Castanon is not fluent in English. Therefore, we had the  
15 help of Mr. Estrada, who did the translation from Spanish to English  
16 for this evaluation.")).

17 The ALJ failed to address the evidence, cited above, that  
18 indicated that Ms. Castanon had poor English skills. Finally,  
19 although the record contains a substantial number of medical and  
20 vocational forms filled out by hand (AR 97-106, 114-123, 124-129),  
21 the ALJ failed to establish whether Ms. Castanon completed these  
22 herself without assistance.

23 The Commissioner bears the burden of establishing that Ms.  
24 Castanon is literate and the ALJ made no express finding that Ms.  
25 Castanon could read and write in English. At present, there is  
26 insufficient evidence in the record to determine whether or not Ms.  
27 Castanon is literate in English.

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1       Accordingly, this issue is remanded to the Commissioner to  
2 determine whether Ms. Castanon is literate, that is, that there is  
3 substantial evidence that she can read and write at least simple  
4 instructions or inventory lists in English.

5 II. ALJ's Identification of Other Substantial Gainful Work

6       Ms. Castanon argues that, at step five, the ALJ improperly  
7 concluded that she could do other substantial work because he  
8 relied on jobs the VE identified which were beyond her skill level  
9 based on the general education development (GED) requirements listed  
10 in the Dictionary of Occupational Titles (DOT). Ms. Castanon also  
11 objects to being denied an opportunity to cross-examine the VE about  
12 the GED requirements for each job he suggested. The Commissioner  
13 contends that Ms. Castanon fails to refute that her past work as a  
14 bottling line attendant demonstrates that she has the GED  
15 requirements of the jobs suggested by the VE.

16       If a claimant shows that he or she cannot return to his or her  
17 previous job, the burden of proof shifts to the government to show  
18 that the claimant can do other kinds of work. Embrey v. Bowen, 849  
19 F.2d 418, 422 (9th Cir. 1988). Without other reliable evidence of a  
20 claimant's ability to perform specific jobs, the government must use  
21 a vocational expert to meet that burden. Id. If the GED levels of  
22 the VE's suggested jobs fail to comport with a claimant's noted  
23 limitations and RFC, the ALJ must definitively explain this  
24 deviation. Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001).

25       The ALJ posed two hypotheticals to the vocational expert. Both  
26 hypotheticals were based on Ms. Castanon's age, education, and past  
27 work experience, and differed only in degree and frequency of manual  
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1 manipulation (AR 332). For his conclusion that Ms. Castanon was not  
 2 disabled prior to age fifty-five, the ALJ relied on the VE's  
 3 testimony that, even with the limitations in grasping and  
 4 manipulating, Ms. Castanon was eligible for jobs such as children's  
 5 attendant, usher, photo counter clerk, and gate guard. (AR 334-7).

6 The GED requirements of Ms. Castanon's prior job as a bottling  
 7 line attendant are R1, M1, and L1.<sup>4</sup> The GED requirements of the  
 8 VE's suggested jobs are higher: (1) photo counter clerk: R2, M2 and  
 9 L2; (2) gate guard: R3, M2 and L2; (3) usher: R2, M1, and L1; and  
 10 children's monitor: R2, M1 and L1.<sup>5</sup>

11 The ALJ did not make any findings regarding Ms. Castanon's  
 12 reasoning, mathematical or language abilities. Thus, there is no

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13  
 14 <sup>4</sup> According to Appendix C of the Dictionary of Occupational  
 15 Titles (DOT), the GED embraces those aspects of education (formal  
 16 and informal) which are required of the worker for satisfactory job  
 performance. The GED Scale is composed of three divisions:  
 Reasoning Development (R), Mathematical Development (M), and  
 Language Development (L).

17 <sup>5</sup> Appendix C of DOT indicates that R1 requires enough  
 18 commonsense understanding to carry out simple one- or two-step  
 19 instructions and the ability to deal with standardized situations  
 20 with occasional or no variables from these situations encountered  
 21 on the job. R2 requires enough commonsense understanding to carry  
 22 out detailed but uninvolved written or oral instructions and an  
 23 ability to deal with problems involving a few concrete variables  
 24 from standardized situations. R3 requires, among other things,  
 25 enough commonsense understanding to carry out instructions  
 26 furnished in written, oral, or diagrammatic form. L1 requires the  
 27 recognition of 2,500 (two or three syllable) words and a reading  
 rate of 95-120 words per minute. L2 requires, among other things,  
 a passive vocabulary of 5,000 to 6,000 words and a reading rate of  
 190-215 words per minute. M1 requires, among other things, the  
 ability to add and subtract two digit numbers, multiply and divide  
 by 10's and 100's by 2, 3, 4, and 5, perform the four basic  
 arithmetic operations with coins as part of a dollar, and perform  
 operations with units such as cup, pint, and quart; inch, foot, and  
 yard; and ounce and pound. M2 requires, among other things, the  
 ability to add, subtract, multiply, and divide, compute ratios,  
 rates, and percentages; and draw and interpret bar graphs. Id.

1 determination of Ms. Castanon's reasoning capacity for detailed  
2 written or oral instructions as required by R2 or whether her  
3 passive vocabulary exceeds 5,000 English words or if she can read at  
4 the estimated rate of 190-215 words per minute as required by L2.  
5 There is minimal evidence in the record of Ms. Castanon's  
6 mathematical skills. During a May 5, 2003 Vocational Testing  
7 evaluation, she was unable to perform on any math test because "she  
8 didn't know any math" (AR 141). This evaluation also stated Ms.  
9 Castanon had "no technical numerical skills," and "below average  
10 clerical comprehension." However, a February 17, 2004 Vocational  
11 Testing evaluation reported that Ms. Castanon successfully operated  
12 a commercial electronic cash register, calculated multi-item  
13 purchases, computed sales tax, and made accurate change. (AR 156).  
14 Nonetheless, there is no substantial evidence that Ms. Castanon can  
15 "compute ratios, rates, and percentages; and draw and interpret bar  
16 graphs" as required by M2.

17 Furthermore, Plaintiff correctly points out that, at the  
18 hearing before the ALJ, she was denied the opportunity to cross-  
19 examine the VE regarding the GED levels of the jobs he was  
20 suggesting. See AR 344.

21 The Commissioner's argument that the ALJ was not required to  
22 make findings on the GED levels of the VE's suggested jobs because  
23 they are comparable to Ms. Castanon's past work as a bottling line  
24 attendant is unpersuasive. As discussed above, the requirements of  
25 each suggested job are higher in at least one of the GED areas.

26 Because the ALJ failed to explain whether Ms. Castanon was  
27 capable of performing the VE's suggested jobs, this issue is

1 remanded to the Commissioner.

2 III. ALJ's Consideration of Depression

3 Ms. Castanon challenges the ALJ's step two determination that  
4 her depression was not a "severe impairment" and argues that his  
5 exclusion of it in his hypotheticals to the vocational expert  
6 constitutes error. The Commissioner argues that Ms. Castanon  
7 produced no evidence that her depression interfered with her ability  
8 to work and therefore she has not satisfied her burden of proving  
9 mental disability.

10 A severe mental impairment is one that significantly limits an  
11 individual's physical or mental ability to do basic work activities.  
12 20 C.F.R. § 404.1521(a)(2003). The determination at step two of  
13 whether a mental impairment is severe is meant to identify at an  
14 early stage those claimants whose medical impairments are so slight  
15 that it is unlikely they would be found to be disabled even if their  
16 age, education, and experience were taken into account. Bowen v.  
17 Yuckert, 482 U.S. 137, 140, 153 (1987). The ALJ has a duty to  
18 develop the record fully and fairly, even when the claimant is  
19 represented by counsel. Tonapetyan v. Halter, 242 F.3d 1144, 1150  
20 (9th Cir. 2001). This duty is heightened where the claimant may be  
21 mentally ill. Id.

22 After reviewing Ms. Castanon's medical records, the ALJ  
23 concluded that her depression was not a severe impairment because  
24 she received no treatment specifically for depression and it was not  
25 diagnosed as a medical illness by any of her treating or examining  
26 physicians. (AR 22).

27 Although the record shows that Dr. Friedman, one of Ms.  
28

1 Castanon's treating physicians, treated Ms. Castanon for depression,  
2 substantial evidence supports the ALJ's conclusion that Ms.  
3 Castanon's depression was not severe. Dr. Friedman addressed  
4 depression in his treatment notes dating from 2002 and 2003. (AR  
5 286-300). On September 22, 2003, Dr. Friedman prescribed the  
6 antidepressant Paxil. (AR 291). On November 4, 2003, his notes  
7 indicate that Ms. Castanon's depression improved after treatment  
8 with Paxil. (AR 289).

9       Significantly, on the disability reports Ms. Castanon filled  
10 out as part of her application for Social Security benefits, she did  
11 not indicate depression as a condition that limited her ability to  
12 work or required treatment (AR 98, 105, 115). Also, on a  
13 Reconsideration Disability Report form, dated September 11, 2003,  
14 Ms. Castanon did not indicate that depression was a physical or  
15 mental condition. (AR 132). Two Vocational Testing Reports dated  
16 May, 2003 and February, 2004 made no mention of depressive symptoms  
17 and indicated that Ms. Castanon "appeared motivated with recognition  
18 for good work performance," (AR 141), "demonstrated an even  
19 disposition," (AR 156), along with "many worker traits, habits, and  
20 behaviors associated with competitive employment" (AR 143) and was  
21 "a cooperative individual who got along well with staff." (AR 143).

22       There are only two mentions of depression in the record that  
23 the Court could find, other than Dr. Friedman's notes. The first is  
24 Ms. Castanon's indication, in a Daily Activities Questionnaire, that  
25 she takes Paxil for "pain and stress." (AR 148). The second is on  
26 an Extortional Daily Activities Questionnaire, dated May 13, 2003,  
27 in which Ms. Castanon indicated she was depressed as a result of  
28

1 over-dependence on family and being unable to stop the pain. (AR  
2 129).

3 Based on all of the evidence, the ALJ's determination that Ms.  
4 Castanon's depression was not a severe impairment because it did not  
5 interfere with her ability to work is supported by substantial  
6 evidence.

7 Ms. Castanon cites Mayes v. Massanari, 276 F.3d 453 (9th Cir.  
8 2001) for the proposition that to the extent that the record is  
9 ambiguous or inadequate, the ALJ has a duty to develop it. However,  
10 here, the ALJ had no duty to develop the record because it was  
11 neither ambiguous nor inadequate to allow for proper evaluation of  
12 the evidence. Although the ALJ did not mention that Dr. Friedman  
13 treated Ms. Castanon for depression with Paxil, Dr. Friedman's  
14 follow-up note indicated that her depression improved with Paxil.  
15 Thus, the fact that Dr. Friedman prescribed Paxil is not evidence  
16 that Ms. Castanon's depression limited her ability to engage in  
17 basic work activities. Ms. Castanon's claim that the ALJ erred  
18 regarding his determination that her depression was a severe  
19 impairment is unavailing.

20 IV. ALJ's Consideration of Examining Physicians

21 Ms. Castanon argues that the ALJ, in determining her RFC,  
22 improperly rejected the opinions of examining physicians Dr. Chun  
23 and Dr. Talcott regarding her capacity for lifting and for standing  
24 and sitting.

25 A. Legal Standard

26 The Ninth Circuit distinguishes among the opinions of three  
27 types of physicians: treating physicians, examining physicians, and  
28

1 non-examining physicians. Lester v. Chater, 81 F.3d 821, 830 (9th  
2 Cir. 1996). "As a general rule, more weight should be given to the  
3 opinion of a treating source than to the opinion of doctors who do  
4 not treat the claimant." Id. Where there are contradictions  
5 between the opinions of the treating physician and others, the ALJ  
6 must detail specific and legitimate reasons supported by substantial  
7 evidence to reject the opinion of the treating physician. Id. If  
8 the treating physician's opinion is "brief, conclusory, and  
9 inadequately supported by objective signs and laboratory findings,"  
10 it is appropriate to reject it. Thomas v. Barnhart, 278 F.3d 947,  
11 957 (9th Cir. 2002); Magallanes v. Bowen, 881 F.2d 747, 750, 754  
12 (9th Cir. 1989). The examining doctor is entitled to less weight  
13 than a treating doctor and more weight than a non-examining doctor,  
14 but may still only be rejected for "specific and legitimate reasons  
15 that are supported by substantial evidence in the record." Lester,  
16 81 F.3d at 830-31. Also like the treating doctor, an uncontradicted  
17 opinion of an examining doctor can only be rejected by providing  
18 "clear and convincing reasons." Id. The reports of consulting,  
19 non-examining physicians should be discounted and not treated as  
20 substantial evidence when contradicted by other evidence. Pitzer v.  
21 Sullivan, 908 F.2d 502, 506 n.4 (9th Cir. 1990); Gallant v. Heckler,  
22 753 F.2d 1450, 1454 (9th Cir. 1984). A medical opinion may be  
23 contradicted by non-medical evidence such as testimony. Id. at 831.  
24 Although the ALJ may decide between conflicting evidence, he may not  
25 simply substitute his own medical opinion for that reflected in the  
26 evidence. Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988);  
27 Marcia v. Sullivan, 900 F.2d 172, 177 n.6 (9th Cir. 1990).

1 B. Analysis

2 Ms. Castanon's treating physicians did not indicate any  
3 limitations regarding lifting, sitting or standing. Dr. Chun, one  
4 of Ms. Castanon's examining physicians, opined that Ms. Castanon was  
5 capable of "occasionally lifting and carrying ten pounds." (AR  
6 242). Dr. Chun also concluded that Ms. Castanon's ability to stand,  
7 walk and sit was unrestricted. Id. Dr. Talcott, another examining  
8 physician, indicated Ms. Castanon was able to lift in excess of  
9 twenty pounds, but was only able to lift any amount on an  
10 intermittent basis. (AR 261). Dr. Talcott also indicated that Ms.  
11 Castanon could sit, stand, and walk for up to four hours of an  
12 eight-hour workday. Id. Dr. Dann, a non-examining physician,  
13 believed that Ms. Castanon was "capable of frequently lifting and  
14 carrying twenty-five pounds, [and] occasionally lifting and carrying  
15 fifty pounds with upper extremity limitations." (AR 244) Dr.  
16 Mehrkhast, another non-examining physician, indicated that Ms.  
17 Castanon could "occasionally lift twenty pounds [and] frequently  
18 lift ten pounds." (AR 264-6). Drs. Dann and Mehrkhast indicated  
19 that Ms. Castanon could sit and stand about six hours in an eight-  
20 hour workday. (AR 244, 264).

21 1. Lifting Limitation

22 By concluding that Ms. Castanon was capable of light work, the  
23 ALJ found that she could frequently lift and carry objects weighing  
24 up to ten pounds and she could infrequently lift objects weighing up  
25 to twenty pounds. The ALJ correctly found that the opinions of  
26 Plaintiff's treating physicians, who did not provide any lifting  
27 limitations, were more persuasive than the consultative and  
28

1 examining physicians. Also, the ALJ correctly determined that the  
2 treating sources' opinions were not determinative because all of the  
3 examining and consultative physicians had opined that Plaintiff had  
4 some lifting limitation. With the exception of Dr. Chun, all  
5 examining and consulting physicians opined that Plaintiff could lift  
6 more than twenty pounds. Therefore, the ALJ's conclusion that  
7 Plaintiff could lift twenty pounds occasionally and ten pounds  
8 frequently was reasonable based on the medical records as a whole.

9 Ms. Castanon argues that, in determining her lifting RFC, the  
10 ALJ adopted the opinion of the consultative physicians over the  
11 opinions of the examining physicians. However, Ms. Castanon's  
12 argument ignores the fact that her treating physicians did not  
13 indicate any lifting restrictions for her. The ALJ, therefore, was  
14 not only comparing the examining physicians' opinions with those of  
15 the consultants; he was also comparing her treating physicians'  
16 opinions with those of the other doctors and thus had to determine  
17 what her RFC was from opinions ranging from no lifting limitations  
18 to an opinion stating she could only lift ten pounds. Therefore,  
19 the ALJ's opinion was a proper resolution of conflicting medical  
20 opinions.

21 2. Sitting, Standing and Walking Limitations

22 Ms. Castanon does not respond to the Commissioner regarding the  
23 ALJ's determination of her sitting, standing and walking RFC.  
24 Therefore, she may have conceded it. Nevertheless, the Court  
25 concludes that the ALJ properly found that Ms. Castanon has no  
26 sitting, standing or walking limitations.

27 Dr. Chun and both consulting physicians indicated that Ms.

28



1 Castanon could stand or walk six hours in an eight-hour workday.  
2 Only Dr. Talcott concluded that Ms. Castanon was limited in this  
3 area. Ms. Castanon's treating physicians indicated no limitations  
4 in this area. Thus, the ALJ's assessment that Ms. Castanon could  
5 stand or walk for six hours in an eight-hour day was a proper  
6 resolution of conflicting medical opinions.

7 IV. ALJ Failed to Conduct Proper RFC Determination

8 Ms. Castanon argues that the ALJ's reasons for his RFC, that it  
9 was "a compromise, over time, based on the actual objective evidence  
10 and testimony" falls short of the type of analysis the regulations  
11 require.

12 As discussed above, the ALJ properly determined Ms. Castanon's  
13 RFC by resolving conflicting medical opinions. Therefore, this  
14 claim is unavailing.

15 V. Remand for Reconsideration

16 Ms. Castanon asks the Court to reverse and award benefits or  
17 remand for reconsideration.

18 The Court has discretion to remand the case for further  
19 administrative proceedings or to award payment of benefits.  
20 Swenson, 876 F.2d at 689. An award of benefits is appropriate where  
21 no useful purpose would be served by further administrative  
22 proceedings or when the record has been fully developed and there is  
23 insufficient evidence to support the ALJ's conclusion. Rodriguez,  
24 876 F.2d at 763. Where remand would only delay the receipt of  
25 benefits, judgment for the plaintiff is appropriate. Id. However,  
26 remand for further proceedings is appropriate where additional  
27 proceedings could remedy defects. Id.

1 At step five of the sequential evaluation process, the ALJ  
2 determined that Ms. Castanon was not illiterate. In doing so, the  
3 ALJ failed to establish with substantial evidence that Ms. Castanon  
4 could read or write English. Furthermore, the ALJ did not explain  
5 whether Ms. Castanon is able to perform the DOT requirements for the  
6 jobs he indicated are available to her. Because the ALJ may be able  
7 to remedy these deficiencies, remand is the proper remedy.

8 The Court reverses the ALJ's decision and remands Plaintiff's  
9 claim for further proceedings consistent with the Court's findings.

10 CONCLUSION

11 For the foregoing reasons, the Court denies both parties'  
12 cross-motions for summary judgment, and grants Ms. Castanon's motion  
13 to remand for further proceedings as instructed.

14 IT IS SO ORDERED.

15  
16 Dated: 7/14/06



17  
18 CLAUDIA WILKEN  
United States District Judge